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Uniform Pricing in Concentrated Markets: Is Conscious Parallelism Prohibited by Article 85(1) of the Treaty of Rome

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NOTES

UNIFORM PRICING IN CONCENTRATED MARKETS: IS CONSCIOUS PARALLELISM PROHIBITED BY ARTICLE 85(1) OF THE TREATY OF ROME?

Of the difficult problems of antitrust regulation confronting the European Economic Community (EEC), one of the most perplexing is how to prevent stagnation of price competition in concentrated markets. Article 85(1) of the Treaty of Rome prohibits "agreements," "decisions," and "concerted practices" which are designed to prevent, restrict, or distort competition.[1] When price competition has ceased among enterprises in any given market, and the antitrust authorities are unable to prove the existence of an "agreement" or "decision," attention turns to whether "concerted practices" can be shown.[2] The problem which has yet to be solved satisfactorily is precisely what constitutes a "concerted practice." Is some element of anticompetitive intent required, or is the existence in fact of an ostensibly noncompetitive market situation[3] sufficient? Stated differently, must the EEC Commission find at least some tacit or informal agreement to cooperate, or does "concerted practice" mean strict liability for price uniformity?

These questions acquire added significance when the enterprises under investigation are participants in a concentrated market.[4] In such a market

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1. Treaty Establishing the European Economic Community, *done* March 25, 1957, art. 85(1), 1 CCH COMM. MKT. REP. ¶ 2005 (1973):

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . .

An unofficial English translation appears in 298 U.N.T.S. at 47-48.

2. The reason is an evidentiary one. It is possible to find "concerted practices" from circumstantial evidence where there is no other evidence that enterprises have entered into any formal mutual agreement. 6 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, EEC ¶ 2.0, at 1 (1962).

3. An ostensibly noncompetitive market situation or relationship broadly refers to a set of market facts or circumstances of economic interaction between two or more enterprises which would be present if those enterprises had mutually agreed not to compete, but which is not necessarily in fact the result of such an agreement.

4. A concentrated market, for purposes of this discussion, is a near oligopoly

it is theoretically possible for purely competitive, independent decision-making based on rational economic calculation to thrust the enterprises involved into an outwardly noncompetitive market relationship which is virtually indistinguishable from that which would be produced by mutual agreement not to compete.[5] This can happen when the enterprises are practicing what is called "conscious parallelism," by which the market behavior of hypothetical enterprise *A* tends to conform to that of its competitor enterprise *B*, simply because *A* has acted independently in response to, or in anticipation of the actions of *B*.[6] In a concentrated market, competitors enjoy an increased ability to correctly anticipate each other's actions because of the simplification of economic calculations resulting from the small number of enterprises in the market.[7] Thus, as market "transparency" increases, so does the likelihood of price uniformity without any type of mutual agreement.

It is one of the fundamental assumptions of this Note that "conscious parallelism" is justifiable competitive behavior and should be distinguished from "concerted practices."[8] On a conceptual level, such a distinc-

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situation where there are only a few sellers, of relatively equal and often great size and capacity, who supply all or most of the products of a particular industry.

5. This is a phenomenon known as "oligopolistic interdependence." For a more complete discussion of this basic theory, see J. BAIN, INDUSTRIAL ORGANIZATION 304-48 (2d ed. 1968); E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 30-35 (8th ed. 1962); W. FELLNER, COMPETITION AMONG THE FEW 3-50, 175-83 (1949); 13 VA. J. INT'L L. 375, 377 n.10 (1973).

6. *See generally* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal*, 75 HARV. L. REV. 655 (1962).

7. *Id. See also* 13 VA. J. INT'L L. 375, 377 n.10 (1973).

8. *See* 13 VA. J. INT'L L. 375, 376 n.9 (1973) and accompanying text. *See also* Turner, *supra* note 6, at 665, who argues that the theory of oligopolistic interdependence provides a basis for excluding conscious parallelism from the meaning of "conspiracy." Seeing conscious parallelism as an economically rational course of action in a concentrated market, he states:

> To repeat, it can fairly be said that the rational oligopolist is behaving in exactly the same way as is the rational seller in a competitively structured industry; he is simply taking another factor into account, which he has to take into account because the situation in which he finds himself put it there.

Turner, *supra* note 6, at 665-66. Turner's thesis is challenged by Posner, *supra* note 6, at 1566-67, who criticizes the theory of oligopolistic interdependence on several grounds, pointing out that it makes certain assumptions which yet remain to be conclusively proved. Included are the following: that there is no appreciable time lag between one competitor's action and another's response, that all participants have an equal ability to expand output at the same rate, and that all sales from price reductions are diverted from rivals. Posner's argument is that "tacit collusion or noncompetitive pricing is not inherent in an oligopolistic market structure but, like conventional cartelizing, requires additional, voluntary behavior by sellers," in the form of cooperation and enforcement of that cooperation. Posner, *supra* note 6, at 1578. But Posner does not really invalidate the theory of oligopolistic interdependence as a basis for conceptually distinguishing conscious parallelism, he merely demonstrates that it is less easy for uniformity to be produced by purely independent action than the theory might at first imply.

tion can be made by definition. The term "conscious parallelism" can be understood as a form of over-competition[9] in which actively competing enterprises learn so much about each other that by sophisticated, rational, independent decision-making, based on carefully calculated probabilities, they are able to neutralize each other's pricing behavior, producing an ostensibly noncompetitive relationship. Conversely, "concerted practice" can be defined as a uniformity or parallelism of behavior artificially induced by actions taken in accordance with a mutual understanding between parties to substitute cooperation for the risks of competition.[10] On a practical level, the difference between concerted practice and conscious parallelism can be recognized only by the application of workable standards of proof which differentiate honest, sustained efforts by competing enterprises to abide by the rules of the economic system, on the one hand, from the planned coordination of cooperating enterprises to override it on the other. Such standards have yet to be articulated.[11]

The importance of maintaining the distinction is clear. If "concerted practice" is understood to include "conscious parallelism," then article 85(1) imposes a form of strict liability for the creation of price uniformity, regardless of the culpability of the parties. Such an outcome disdains any suggestion that competition is a state of mind as well as an objective phenomenon.[12] Accordingly, in recognition of the view that noncompetitive behavior requires anticompetitive intent, the purpose of this Note is threefold: (1) to show that Common Market tribunals have interpreted "concerted practice" to mean strict liability for noncompetitive effects in concentrated markets; (2) to demonstrate how this is inconsistent with the purposes of the Treaty of Rome and the needs of the Common Market and to suggest the meaning of "concerted practice" most appropriate for a system of antitrust regulation based upon culpable anti-

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9. Finding the nature of "conscious parallelism" in the idea of competition is considered, but not developed, by C. OBERDORFER, A. GLEISS, & M. HIRSCH, COMMON MARKET CARTEL LAW ¶ 12, at 14-15 (2d ed. 1971):

> "Concerted practices" therefore are not present where several enterprises merely act identically in the market or where an enterprise merely adapts itself to the market behavior of one or more of its competitors; such conduct need not be based on mutual concert of action, but can be the result of keen competition.

See also Note, *Conscious Parallelism—Fact or Fancy?*, 3 STAN. L. REV. 679, 693 (1951); Givens, *Parallel Business Conduct Under the Sherman Act*, 5 ANTITRUST BULL. 273 (1960) (recognizing that parallel conduct tends to be required by competition but not seeing that as a basis for distinguishing it from concerted action).

10. *See generally* Posner, *supra* note 6, at 1577; Turner, *supra* note 6, at 665.

11. *See* 13 VA. J. INT'L L. 375, 379 (1973). *See also* F. A. Mann, *The Dyestuffs Case in the Court of Justice of The European Communities*, 22 INT'L & COMP. L.Q. 35, 37 (1973).

12. *See* notes 28-31 *infra* and accompanying text.

competitive conduct; and (3) to enunciate workable standards of proof for distinguishing in fact between conscious parallelism and concerted practices.

I

DYESTUFFS AND STRICT LIABILTY

The first attempt by the European Court of Justice to give content to the article 85(1) notion of concerted practices was in *Imperial Chemical Industries, Ltd. v. EEC Commission.*[13] In that case, ICI, a British corporation, marketed dyestuffs through subsidiaries in which it held a controlling interest and which were located in the European Economic Community. The Court found that ICI, through its subsidiaries, acted in concert with other EEC dyestuffs producers[14] to simultaneously and uniformly fix, on three occasions, rates of price increases.[15] It defined

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13. 2 CCH COMM. MKT. REP. ¶ 8161 (1973), 11 Comm. Mkt. L.R. 557 (Eur. Ct. of Justice 1972), *aff'g* Commission Decision of July 24, 1969, [1965-1969 Transfer Binder: New Developments] CCH COMM. MKT. REP. ¶ 9314, 8 Comm. Mkt. L.R. D23 (R.P. Supp. 1969) (Comm'n of the EEC 1969) [hereinafter cited textually as *Dyestuffs*].

14. ICI brought the appeal to the European Court of Justice after the EEC Commission, in a decision of May 31, 1967, had found that ten producers of dyestuffs—of which ICI was one—had engaged in concerted practices in violation of article 85(1). The producers were: Bayer, BASF, Cassella, and Hoechst (Germany); Francolor (France); ACNA (Italy); Ciba, Geigy and Sandoz (Switzerland); Imperial Chemical Industries, Ltd. (U.K.). These ten producers, generally large in size, accounted for eighty percent of the market. They were actively engaged in competition, not only in the quality of their products, but in technical assistance and price, through substantial discounts given selectively to important customers. Average interchangeability of standard dyestuffs was relatively high. In addition, the dyestuffs market was characterized by the fact that there were five isolated national markets with varying price levels and each such market exhibited oligopolistic features. This partitioning was due to the need to offer on-the-spot assistance and to guarantee immediate delivery. On a majority of these markets, the price level was formed under the influence of a price leader. 2 CCH COMM. MKT. REP. ¶ 8161, at 8027-28 (1972), 11 Comm. Mkt. L.R. at 623-24.

15. Between January 1964 and October 1967, there were three general and uniform increases in the prices of dyestuffs in the Community. On January 7, 1964, Ciba-Italy, on instructions from Ciba-Switzerland, announced and immediately put into effect a fifteen percent price increase. The other producers on the Italian market followed within two or three days and on January 9, 1964, ICI Holland initiated an identical increase for the Netherlands as did Bayer for the Belgium-Luxembourg market. Generally, these affected the same range of products, *i.e.* most aniline dyes.

The 1965 price increases went into effect on January 1 and had been announced in advance by several enterprises. On the German market, the increases amounted to fifteen percent for the products whose prices had already been raised by the same percentage on other markets and to ten percent on other products. BASF first announced the proposed price increase on October 14, 1964, and was followed by Bayer on October 30 and Cassella on November 5. All of the other producers named in the Commission's decision, except ACNA of Italy, joined in the general price increase which was put into effect simultaneously in all markets except the Italian market because

the term "concerted practices" to mean a "form of coordination between enterprises that has not yet reached the point where there is a contract in the true sense of the word but which, *in practice,* consciously substitutes a practical cooperation for the risks of competition."[16]

While the Court's definition of "concerted practice" includes the adverb "consciously," the phrase in which it is found is modified by the preceeding phrase "in practice," which would seem to mean "in fact" or "in effect." If this is correct, the definition could better be understood as *a form of coordination which has the effect of consciously substituting a practical cooperation for the risks of competition.* What does the Court mean by "practical cooperation"? Why not simply use the term "cooperation"? Clearly, there are strong indications that the Court's definition of "concerted practice" focuses on ends rather than means, on consequences rather than culpability.[17]

In its arguments before the Court, ICI maintained that what had taken place was mere conscious parallelism, and not a concerted practice.[18] The Court attributed little significance to that position noting that conscious parallelism can be a

> decisive indication of [concerted practices] where it leads to competitive conditions that are not, considering the nature of the goods, the size and number of the enterprises concerned, and the extent of the market, normal market conditions.[19]

A reasonable interpretation of this is that when abnormal market conditions appear, conscious parallelism is no different than a concerted practice.[20]

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of ACNA's refusal and the French market because of a price freeze. The range of products affected did not vary between enterprises.

The 1967 increase followed a similar pattern. At a meeting attended by all the producers named (except ACNA), which was held in Basel on August 18, 1967, the Swiss-based firm Geigy announced its intention to raise prices by eight percent as of October 16, 1967. Bayer and Francolor made similar announcements on the same occasion, and by September all enterprises named in the decision had announced an eight percent price increase (twelve percent in France) to take effect on October 16 in all countries except Italy, where ACNA again refused to raise prices. *Id.* at 8028-29, 11 Comm. Mkt. L.R. at 624-25.

16. *Id.* at 8027, 11 Comm. Mkt. L.R. at 622. In its decision, the Court found a concerted practice by imposing a form of strict liability on the dyestuffs producers for the uniform price increases of 1964, 1965, and 1967. This is apparent upon an examination of how the Court defined "concerted practice," how it described the relationship between "conscious parallelism" and "concerted practices" and most importantly, how it evaluated the evidence it used in finding a concerted practice.

17. By adopting such a definition, the Court seems to prefer a result-oriented approach. *See* notes 28-31 *infra* and accompanying text.

18. 2 CCH COMM. MKT. REP. ¶ 8161, at 8027 (1972), 11 Comm. Mkt. L.R. at 622.

19. *Id.*, 11 Comm. Mkt. L.R. at 622-23.

20. *See* Note, *Common Market—Antitrust—Interpretation of Concerted Practices*

The Court in *Dyestuffs* based its finding of concerted practices on the argument that through advance announcement by dyestuff manufacturers of proposed price increases,

> the various enterprises eliminated any uncertainty as to their future conduct and therefore also much of the normal risk connected with any autonomous change in conduct on one or more markets . . . . [Thus] the enterprises . . . temporarily eliminated some of the conditions of competition in the market which prevented uniform parallel conduct.[21]

Note that the Court fixed liability on the ground that those conditions which prevented uniform parallel conduct were eliminated, not upon any affirmative understanding between the parties to engage in such conduct.[22] Because the 1964 price increase demonstrated the possibility of "price leadership," the *Dyestuffs* Court calmly presumed that any advance announcement of a price hike which had the *effect* of reducing the risks of competition was an invitation to collusion. In other words, because collusion was *possible* and uniformity was present, the parties were held to have engaged in a concerted practice.

II

THE TREATY OF ROME AND CULPABILITY

It should be apparent that the *Dyestuffs* decision did little to distinguish the meaning of "concerted practices" from "conscious parallelism." By minimizing the significance of culpability, the Court demonstrated its willingness to hold enterprises strictly liable for ostensibly noncompetitive markets.[23] That this is neither consonant with the purposes of article 85(1) nor in accord with the needs of the Common Market can be shown by a detailed examination of the Treaty of Rome itself.

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within Meaning of Article 85, 14 HARV. INT'L L.J. 621, 625 (1973); 13 VA. J. INT'L L. 375, 379 (1973).

21. 2 CCH COMM. MKT. REP. ¶ 8161, at 8029 (1972), 11 Comm. Mkt. L.R. at 626.

22. The Court, however, did devote some attention to facts from which intention (or lack thereof) could have been inferred. It concluded that the European dyestuffs market could not be considered a strict oligopoly, since in such a market price competition could no longer play an important part, and in the dyestuffs market the producers were powerful and numerous enough to create a substantial risk that some of them would not subscribe to price leadership. *Id.*, 11 Comm. Mkt. L.R. at 626. But the Court's analysis of the markets was superficial at best. *See* Korah, *Concerted Practices*, 36 MODERN L. REV. 220, 224 (1973). Moreover, as the refusal of ACNA to join the price hike indicated, there were five relevant markets, not one, and these were oligopolistic. *Id.* at 223. Finally, nowhere does it clearly appear that the Court actually did infer any anticompetitive intent from the economic analysis in which it dabbled. For a fuller discussion of how such intent can be inferred from circumstantial evidence, see notes 48-49 *infra* and accompanying text.

23. *See* Korah, *supra* note 22, at 225-26.

Under accepted rules of treaty interpretation,[24] it is unclear whether the signatories intended, through the use of the words "concerted practice," to make illegal all uniform pricing or only uniform pricing practices which are accompanied by anticompetitive intent.[25] Commentators have had difficulty clarifying the problem.[26] Confronted with such

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24. The Treaty of Rome must be interpreted pursuant to the rules applying to international treaties because, although governing a supranational organization it came into being as an international treaty between states. Coing, *International Problems of Article 85*, 38 N.Y.U.L. REV. 441, 447 (1963). According to international rules, the problem of interpretation is to determine the common intentions of the parties by first examining the "natural and ordinary meaning" of the words used, at least in the absence of authoritative records of intention as here. Résolutions adoptées par l'institut à la Session de Grenade 11-20 avril 1956, art. 1, para. 1, in [1956] ANN. DE L' INSTITUT DE DROIT INTERNATIONAL 358, 359, 50 AM. J. INT'L L. 644, 645 (1956).

25. The problem of determining the natural and ordinary meaning of the term "concerted practices" is complicated by the fact that the term as it appears in different official translations has different connotations. For example, the Italian version of Article 85(1) seems to encompass the concept of "conscious parallelism." 2 BUSINESS REGULATION IN THE COMMON MARKET NATIONS 519 (H.M. Blake ed. 1969). But the German version is translated as "mutually attuned modes of conduct" which, while not necessarily connoting agreed-upon action, does seem to require some consensual element that distinguishes it from mere "conscious parallelism." C. OBERDORFER, A. GLEISS & M. HIRSCH, *supra* note 9, at 14.

Ordinarily, where there are differing official versions, the original wording of the treaty, or the wording which served as the basis for negotiations is examined, using a theory of historical interpretation to determine the intent of the parties. OPHÜLS, FESTGABE FÜR MULLER-ARMAK 283-84, cited in Coing, *supra* note 24, at 449. The Mavrommatis Palestine Concessions, [1924] P.C.I.J., ser. A, No. 2, at 19 (preference given to the English wording of the Palestine mandate because it was the original wording). Speaking specifically about article 85, it is unknown which wording was first in time. Coing, *supra* note 24, at 451. Under these circumstances the next procedure is to compare the different versions of the term for semantic content, in other words their main substance, regarding that content which is common to all as what was mutually agreed upon. *See* Mavrommatis Palestine Concessions, *supra*, and the explanation in Coing, *supra* note 24, at 449. The difficulty in applying this rule is determining whether the semantic content of "concerted practice," which includes not only some form of agreement but conscious parallelism, is less broad than that which does not include conscious parallelism.

26. Consider, for example, the conclusions of Oberdorfer, Gleiss and Hirsch. For them, a concerted practice requires the establishment of and adherence to a plan imposing less of an obligation on the participating parties than a gentleman's duty, but more than mere conscious parallelism. They maintain that the participants need not establish direct contact with one another, but only that the plan actually be communicated by someone, if only a third party. C. OBERDORFER, A. GLEISS & H. HIRSCH, *supra* note 9, at 15. Having thus made the argument that a concerted practice requires at least some form of agreement, they proceed to proclaim that the manner of concerting is immaterial and that article 85 is directed at the result, not the means. *Id.* at 16.

Similar confusion is exhibited by Deringer who also sees concert in a common plan which must be established by a mutual understanding of the parties concerning their future economic behavior. A. DERINGER, THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY, ¶ 121, at 12 (1968). Deringer specifically classifies mutual understanding as a form of agreement, and even distinguishes concious parallelism by declaring that there is no concerted practice where "an enterprise, by unilateral action, consciously and intentionally conforms its own behavior to that of another enterprise, as, for example, in the case of price leadership." *Id.* at 13. Having done all this,

uncertainty, EEC tribunals, in construing the term "concerted practice," should strive for that meaning which is most compatible with the overall approach to antitrust regulation embodied in the Treaty of Rome.[27]

Basically, there are two ways to regulate competition among enterprises. One may be termed a rule-oriented approach,[28] the other a result-oriented approach.[29] An interpretation of "concerted practice" requiring the Commission to prove that uniform pricing activities are the result of anticompetitive intent is most compatible with a rule-oriented approach.[30] An interpretation which permits the Commission to impose a form of strict liability for uniform pricing practices best comports with a result-oriented approach.[31] Which of these two approaches is embodied by the Treaty of Rome is the subject of the following analysis.

The Common Market's approach to antitrust regulation has its roots in the basic objectives of the Community[32] as articulated in article 2[33]

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he nevertheless makes the statement that concerted practices extend to prohibit cases of "cooperation purely as a matter of fact." *Id.* ¶ 119, at 11.

27. Coing, *supra* note 24, at 449-50, 452, notes that when standard rules of treaty interpretation are unsuccessful, the particular term should be evaluated in regard to the context in which it is set in the treaty. There are two levels at which the context should be examined. The first is the narrower context of the specific section, sentence, or phrase of the treaty in which the term is found. *See* Geitling v. Haute Autorite 8 Recueil de la Jurisprudence de la Cour 165, 218 (Cour de Justice de la Communauté européenne 1962), where the European Court of Justice, interpreting the European Coal and Steel Treaty, resorted to examination of the specific context in which the term was set. In this connection, at least one writer has argued that article 85(1) places concerted practices on the same level as agreements between enterprises and decisions of associations "so that established rules of treaty interpretation render it impossible to attribute a meaning to the term 'concerted practices' which is not *ejusdem generis* and would render some form of consensus redundant." Mann, *The Dyestuffs Case in the Court of Justice of the European Communities*, 22 INT'L & COMP. L.Q. 35, 36 (1973). The second sense in which context can be examined refers to the consistency of a specific term with the "system embodied in and the aims pursued by the treaty." Coing, *supra* note 24, at 448, 452-53.

28. This seeks to control the behavior of enterprises through emphasis on adherence to a system of rules which define what types of behavior are noncompetitive and thereby embody the goals and purposes of regulation.

29. This seeks to implement the goals and purposes of regulation directly by doing whatever is necessary to achieve a particular desired result.

30. Since the rule-oriented approach emphasizes adherence to certain principles, it recognizes that competition is not only a type of objective behavior, but also a state of mind. Hence, this approach focuses on culpability.

31. Since the result-oriented approach is concerned primarily with consequences, it sees competition only as a type of objective behavior. Whether or not particular enterprises intended to act competitively or anticompetitively is irrelevant.

32. *See* Ellis, *Source Material for Article 85(1) of the EEC Treaty*, 32 FORDH. L. REV. 247, 248-49 (1963).

33. Article 2 reads:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an

and article 3(f)[34] of the Treaty of Rome. Recognizing this, Ellis has summarized the purpose, aims, and objectives of article 85, based upon an analysis of the reports and documents comprising the *actes préparatoires* of the Treaty of Rome, including the Spaak Report,[35] and relevant case law:

> In the conception of the authors of the Treaty, the fusion of the separate markets—or, in other words, the establishment of a common market—is one of the two essential conditions for realizing the objects of the Community, while undistorted competition is a fundamental condition for the success of such a common market. The rules which have to ensure that the free play of competition within the common market is not distorted fulfill a derivative, protective function, consisting in preventing the Community's objectives from being frustrated by disturbances in the functioning of the common market caused by distortions of competition.[36]

In fulfilling its protective function, article 85(1) must somehow strike a balance between control over behavior having noncompetitive effects and freedom of commercial enterprise for the type of maximum economic development described in article 2. Since the term "concerted practice" is an essential component of article 85, its meaning must enhance that balance. This should be remembered in considering the following series of arguments.

A. Arguments for the Result-Oriented Approach

It is a fact that not every cartel or agreement not to compete is damaging to economic and industrial development. Schwartz and Wellman have observed that "both individual behavior and arrangements among

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accelerated raising of the standard of living and closer relations between the States belonging to it.

1 CCH Comm. Mkt. Rep. ¶ 165 (1973), 298 U.N.T.S. at 15.

34. Article 3(f) reads:

> For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein . . . (*f*) the institution of a system ensuring that competition in the common market is not distorted . . . .

1 CCH Comm. Mkt. Rep. ¶ 171 (1973), 298 U.N.T.S. at 15-16.

35. Comité Intergouvernemental Créé Par La Conférence De Messine, Rapport Des Chefs De Délégation Aux Ministres Des Affaires Etrangères, Doc. MAE 120 f/56 (1956), cited in Ellis, *supra* note 32, at 248. Paul-Henri Spaak was the Chairman of the Intergovernmental Committee which was established during the Messina Conference on June 1-2, 1955. The report was accepted by the Conference of Ministers at Venice as a basis for the subsequent negotiations which took place at Val Duchesse near Brussels. Ellis, *supra* note 32, at 248.

36. Ellis, *supra* note 32, at 276. *Accord*, Linssen, *The Application of Articles 85 and 86 of the Treaty*, in Staff of Senate Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess., Antitrust Developments in the European Common Market 160 (Comm. Print 1964) (hereinafter cited as EEC Antitrust Developments). Clearly, the other essential condition is the approximation of the economic policies of the member states.

independent firms, which may contribute to the creation of market power, may at the same time enhance the efficiency with which the processes of production and distribution of goods are conducted."[37] In light of the overriding importance to the Common Market of maximum economic development, as described in article 2, it can be argued that the framers of the Treaty of Rome intended to permit selective application of the antitrust machinery, so that those anticompetitive practices which produce the desired result of overall Community well-being and a higher standard of living for the inhabitants of its members would not be impaired. If this is true and the framers thus intended a result-oriented approach to prevent beneficial cartels from being destroyed, it is a short step to argue that they intended the same approach to provide more effective control of uniform pricing practices which, regardless of the culpability of the parties involved, are harmful to the Community. Such an argument finds some support in Ellis' analysis of the Spaak Report:

> It is to be noted that, while the rules of competition contained in the Treaty are exactly those advocated by the Spaak report with a view to attaining normal conditions of fair competition the expressions "normal" and "fair" competition are not to be found either in the ultimate *actes préparatoires* or in the articles of the Treaty. The Treaty has summarized these conditions and stated them more precisely by prescribing that competition must not be distorted. . . . This requirement . . . is one which relates directly to the requirements of a proper functioning of the fused markets, and this expression therefore ties the elements of fair and normal competition to the objectives of the common market.[38]

The terms "normal" and "fair" admit to wide interpretation. They are subjective terms through which broad formulations of economic policy can enter antitrust regulation. That the framers considered the word "distortion" to embody these two terms may indicate that they intended the Commission to have significant discretion in defining what amounts to anticompetitive behavior. If that is the case, a construction of "concerted practice" which ignores the culpability of the parties involved and focuses merely on the *effects* of their behavior, for whatever purpose, is most appropriate.

Another reason for believing that the framers intended a result-oriented

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37. Schwartz & Wellman, *The Rule of Reason in EEC Antitrust: Efficiency Enhancement Through Integration by Agreement Among Competitors*, 12 VA. J. INT'L L. 192, 193 (1972). The argument also draws support from Angulo and Minshall who have noted, "[t]hroughout European Development, the policy behind trade regulation appears to have been the elimination and control of abusive practices, not of monopolies or restrictive practices themselves." Angulo & Minshall, *An Inquiry into The Economic Philosophies Underlying Antitrust Regulation in the United States and the European Economic Community*, 4 VA. J. INT'L L. 139, 163 (1964).

38. Ellis, *supra* note 32, at 252-53.

approach is based on the difficulty of proving culpability from circumstantial evidence. In a concentrated market situation (where the effects of conscious parallelism are most like those of an agreement not to compete), a few large enterprises having vast resources at their disposal are not only in a favorable position for easy collusion, but are also well equipped through financial leverage and other means to disguise such collusion.[39] In this way, they can avoid effective and necessary regulation under any construction of concerted practice which requires the Commission to prove culpable anticompetitive behavior. In addition, since anticompetitive activity under article 85 is not forbidden by the criminal law as *malum in se,* but is merely a form of undesirable economic activity, at least one writer has suggested that this fact alone justifies a less burdensome standard of proof.[40] In light of these two considerations, one could say that "concerted practice" should be interpreted, on purely practical grounds, to mean strict liability for uniform pricing practices.

B. Arguments in Support of the Rule-Oriented Approach

That the Treaty of Rome embodies a rule-oriented approach to antitrust regulation is apparent from the structure of article 85. The primary emphasis of that provision is on rule adherence, as is demonstrated by the flat prohibition in article 85(1) of "agreements," "decisions" or "concerted practices" which distort competition.[41] In order to provide flexibility in the enforcement of article 85(1) however, the framers of the Treaty of Rome provided in article 85(3) that if the benefits of conduct found illegal under article 85(1) outweigh the harm, such conduct will nevertheless be permitted, regardless of its formal illegality.[42] In this

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39. Attending such problems are those normally associated with any attempt to prove the mental state of individuals, primarily the necessity of relying on circumstantial evidence.

40. *See* Steindorff, *Annotation on the Dyestuff Cases,* 9 Comm. Mkt. L. Rev. 502 (1972).

41. For a copy of the relevant text, see note 1 *supra.* For authority supporting the position see Ellis, *supra* note 32, at 277.

42. Article 85(3) reads:

> The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> —any agreement or category of agreements between undertakings;
> —any decision or category of decisions by associations of undertakings;
> —any concerted practice or category of concerted practices; which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

manner, the framers provided the Commission with enough discretion to apply the antitrust machinery selectively, so that there would be no conflict between control of anticompetitive behavior and the goal of maximum economic development. Because the Treaty of Rome has thus separated its rule-oriented provision from its result-oriented provision, it is difficult to maintain that the meaning of "concerted practice" in article 85(1) should be construed to implement in any way the purposes of article 85(3). This is particularly important since article 85(3) flexibility is of the "one way" type, permitting the Commission to exercise discretion only in regard to concerted practices *already established* under article 85(1). It does not grant the Commission power to relax the requirements of article 85(1) and find a concerted practice where nonculpable uniform pricing behavior is especially damaging to the Community's economic development. Clearly article 85's structure stands in direct contradiction to any thought that the meaning of the word "distortion" in article 85(1) justifies the Commission in exercising anything more than *ex post facto* discretion.

In addition to mentioning the structural arguments supporting a rule-oriented approach, it should also be pointed out that such an approach is free of the numerous practical and administrative difficulties endemic to one which is result-oriented. Saving arguments about burden of proof for section III of this Note, one could begin a list of such difficulties by noting some of the enforcement problems implicit in a result-oriented approach. Unless the Commission chooses to adopt the solution of divestiture,[43] it could find extreme difficulty in altering the behavior of enterprises which may never have entered any form of agreement or even arrived at some mutual understanding. Though the Commission would have the authority to manipulate consequences, businessmen must act according to principles. If it were merely a particular end which was to be avoided—uniform prices for example—enterprises would be placed in the position of attempting to act non-uniformly and such a system might ultimately require deliberate price differentiation. The chaos would be enormous, not to mention the severe damage to any notion of free enter-

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(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1 CCH COMM. MKT. REP. ¶ 2051 (1973), 298 U.N.T.S. at 48.

43. This is suggested by Korah, *supra* note 22, at 226, who also points out that at present the Commission may not have power to order divestiture and that, in any case, the cost would be very great. *Id.* at 226 n.10.

prise.[44] Moreover, some form of agreement can usually be neutralized by an injunctive order; that is clearly not true for conscious parallelism.[45] Other problems in addition to enforcement are also readily apparent. First, the Commission's actions under such an approach would probably be relatively unpredictable owing to the necessity for evaluating each case individually.[46] This in itself can be counterproductive, especially with respect to economic growth and development which often require a stable legal environment. More significantly, such uncertainty could eliminate any incentives for enterprises to undertake "questionable" activities that would have beneficial effects for the Community. Excessive caution would prevail. Second, such a system would encourage a see-no-evil policy whereby enterprises would avoid including in their market calculations the reactions of their competitors in order to minimize any possibility of parallelism. That in itself would weaken the ability of enterprises to compete. Finally, the wide discretion permitted the Commission would open the way to abuse by which the views of the Commission would be substituted for the operation of free market forces.

III

THE PROBLEM OF PROOF

It appears that the Common Market's approach to antitrust regulation is rule-oriented. The construction of "concerted practice" which is most compatible with that approach is one which requires the Commission to prove an element of anticompetitive intent in addition to the existence of uniform prices. The question remains whether such a construction requires the Commission to shoulder an impractical burden of proof. An examination of American jurisprudence and learned commentary[47]

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44. The problem is neatly summarized as follows:

> Once one seller lowers his price, another must lower his in order to maintain his own share of the market, unless his product is sufficiently differentiated to give him a monopoly in the market. But if he lowers his price to merely match the first price cutter, he will be accused of parallel action. Must he strike even lower?

Note, *supra* note 9, at 684.

45. *Id.*

46. *See* Korah, *supra* note 22, at 225-26, who points out such difficulties already exist in the wake of *Dyestuffs*.

47. Section 1 of the Sherman Act has many similarities to article 85: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1971).

It is the opinion of at least three European commentators that the concept of con-

reveals that workable evidentiary standards for distinguishing between uniform pricing coupled with anticompetitive intent (concerted practice) and purely competitive uniform pricing (conscious parallelism) do exist.

Basically, anticompetitive intent can be inferred from three types of circumstantial evidence. The first of these is evidence that the market structure in which the particular enterprises under investigation operate is not sufficiently transparent or oligopolistic to support conscious parallelism. Such evidence would be based on information regarding the number and size of the enterprises involved, the sizes of their particular market shares, the comparability of their production and cost structures, as well as any other factors pertaining to the structure of a market and its performance characteristics.[48] For independent behavior to produce effects similar to those resulting from an agreement not to compete, each enterprise must be able to gather sufficient data from existing market conditions and past behavior of competitors to predict with reasonable

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certed practices in article 85(1) is related to the concept of concerted acts known to the Anglo-American legal system and pertaining to the notion of conspiracy. See C. OBERDORFER, A GLEISS & M. HIRSCH, *supra* note 9, at 14. In addition, the development of the concept of concerted acts reflects a sensitivity to the problem of conscious parallelism. In a series of cases, American courts toyed with the notion that concerted action could be established by mere proof of conscious parallelism. Dicta in American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946), indicated that conspiracy could be proven by circumstantial evidence of an "understanding" between parties. Within four years, some lower courts had stretched the idea far enough to be able to declare, as did the court in Milgram v. Loew's, Inc., 94 F. Supp. 416, 419 (E.D. Pa. 1950):

> In practical effect, consciously parallel business practices have taken place of the concept of meeting of the minds which some of the earlier cases emphasized. Present concert of action, further proof of actual agreement among defendants is unnecessary . . . .

But the Supreme Court was not prepared to discard the requirements that concerted acts must still include some form of culpable anti-competitive behavior. In Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954), it pruned the blossoming career of the conscious parallelism doctrine by a now famous dictum:

> [T]his Court has never held that proof of parallel business behavior conclusively establishes agreement . . . . Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

Id. at 541. Because the development of the concept of concerted acts reveals a concern that antitrust violations be based on culpable behavior, a survey of the American experience can be a very useful guide to the formulation of workable standards for proving anti-competitive intent.

48. It has been argued that such market analysis makes the scope of inquiry too large and unmanageable. Posner, *supra* note 6, at 1583. Such a criticism is of only limited significance here for two reasons: first, since artificiality is based upon a comparison of what the market's structure will justify with what is actually present in the form of noncompetitive effects, the extent of the market analysis required is restricted to those factors which could possibly produce a certain limited effect and no more; second, even if the scope of inquiry were enlarged, such enlargement would only be necessary to distinguish culpable behavior from competitive behavior.

accuracy future behavior and future market conditions. The greater the ability of an enterprise to anticipate its competitors, the more likely it will be that uniform or complementary pricing behavior will result. It should be remembered that the existence of a perfect oligopoly situation is not always necessary for an enterprise to be able to anticipate its competitors. A finding of anticompetitive intent should not be made unless it can be shown that no facts existed which, when combined with reasonable techniques of economic analysis, could have enabled enterprises acting independently to produce uniform prices. Of course, any evidence of intervening factors which would prevent even an oligopolistic market from becoming transparent should also be considered.

A second type of circumstantial evidence which may be used is that showing behavior inconsistent with purely competitive intent.[49] Examples of this type of evidence have been suggested by Posner:[50] (1) evidence that firms practice systematic price discrimination, *i.e.*, a pattern of selling in which the "ratio of price to marginal cost is not the same for all sales of a commodity";[51] (2) prolonged excess of capacity over demand; (3) evidence regarding changes in market price—"prices of noncompeting sellers should change less frequently than prices of competing firms due to difficulty in agreeing at mutually acceptable standards";[52] (4) abnormal profits (even for an oligopoly); and (5) extremely uniform and long continued price leadership.[53]

The third way to prove anticompetitive intent is by circumstantial evidence of a mutually adopted plan the logical consequence of which is price uniformity. Implicit in any plan is the existence of some form of agreement or mutual understanding between the parties involved to cooperate. Such an understanding can be established where reasonable men in the

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49. *Id.* at 1578. See also the recent case of Dahl, Inc. v. Roy Cooper Co. 448 F.2d 17 (9th Cir. 1971), in which the Court of Appeals held that in an antitrust action by a motion picture exhibitor against distributors and other exhibitors, a Sherman Act conspiracy was not established where the plaintiff was able to bid competitively for the first-run showings of films and acquire some films, and where there was an explanation wholly consistent with proper business operations as to every instance in which plaintiff unsuccessfully attempted to obtain film from distributors.

50. Posner, *supra* note 6, at 1578-82.

51. *Id.* at 1578.

52. *Id.* at 1580.

53. Other more traditional types of evidence include (1) fixed market shares for a substantial period, (2) filed identical sealed bids on non-standard items, (3) refusal to give discounts in the face of substantial excess capacity, (4) announcement of price increases far in advance without legitimate business justification for doing so, and (5) public statements of what a seller considers the right price for the industry to maintain. *Id.* at 1582.

positions of the parties would believe that they had at least morally obligated themselves by some action or statement to assist each other rather than compete.[54] One example of a court's reliance on evidence of a mutually adopted plan is *Interstate Circuit, Inc. v. United States*[55] in which the Supreme Court focused on a letter which it construed as an invitation to participate in an unlawful scheme.[56] In that case, eight motion picture film distributors were found to have agreed with each other, in violation of section 1 of the Sherman Act, to enter into and carry out certain contracts with two exhibitors of first run films. The contracts obligated each distributor who signed to require second run exhibitors to maintain a certain minimum price of admission. The Court found that the unlawful agreement between distributors consisted in their mutual adherence to a plan, the necessary consequence of which was an unlawful restraint of interstate commerce. In finding the existence of a plan, the Court emphasized the fact that each distributor had received a letter from one of the first run exhibitors naming all of the other distributors as addressees and proposing the contract terms which were eventually adopted in substance by each.[57] The Court also emphasized that each distributor "knew that all were in active competition and that without substantially unanimous action there was a risk of substantial loss of business and goodwill, but that with unanimity there was the prospect of increased profits" and that this was a strong motive for "concerted action."[58]

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54. Consider the following statement by A. D. Neale:

> Whenever there is a plan, there is mutual awareness among the participants; but it does not follow that whenever there is mutual awareness, there is a plan. A plan implies some assurance of reliable action in the future; its breakdown will usually be a matter for reproach between the parties. "Conscious parallelism of action" is without this quasi-moral element. The actions of others may be highly predictable, as when a number of firms refuse to deal with a bad credit risk, or the film distributors refuse first runs to a "flea pit"; but an unforeseen action is regarded as a fact, like a change in the weather, and not as a betrayal, like a change of allegiance.

1 A. D. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 88 (2d ed. 1970).

55. 36 U.S. 208 (1939).

56. *Id.* at 216. Without that letter, it is doubtful that concerted action could have been established. Note, *supra* note 9, at 683.

57. *Cf.* Moore v. Jas. H. Matthews & Co., 473 F.2d 328 (9th Cir. 1973), where the details of the plan were published by the defendant in a book and were later agreed to individually in meetings and consultations. This case also provides a summary of the current law on the requirement of intent.

58. The Court also observed behavior inconsistent with competitive intent noting that compliance with the proposals involved radical departures from previous business practices; that there was opposition to them by three of the distributors' local man-

In *United States v. Parke, Davis & Co.*[59] the Supreme Court found a mutually adopted plan in which a drug manufacturer, embarking on a program to promote general compliance with the suggested retail prices it had published, induced wholesalers to refuse to deal with any retailer who disregarded the suggested prices. Here the Court emphasized the verbal discussions between each wholesaler and representatives of Parke Davis in which the wholesalers were informed that Parke Davis would refuse to deal with those who sold to retailers who did not observe the suggested price minimums. Also emphasized was that in these discussions each wholesaler was told that its competitors were receiving the same information.[60]

In still another case, *United States v. Container Corp. of America*,[61] the Supreme Court found that a mutually adopted plan was established through the reciprocal exchange of price information. The facts indicated that each producer, upon request by a competitor, would furnish information as to the most recent price charged or quoted to individual customers with the expectation of reciprocity and the understanding that it represented the price currently being bid. The exchange stabilized prices, although at a downward level. In finding concerted action, the Court said, "[t]here was of course freedom to withdraw from the agreement. But the fact remains that when a defendant requested and received price information, it was affirming its willingness to furnish such information in return."[62]

While it should now be apparent that it is possible to formulate work-

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agers, and that without agreement there was a clear risk of diversity of action. 306 U.S. at 227.

59. 362 U.S. 29 (1960).

60. A similar plan was found in United States v. General Motors, 384 U.S. 127 (1966). There, General Motors and certain auto dealers and their associations implemented a mutually adopted plan to deprive franchised dealers of freedom to deal through discounters. As in *Parke Davis*, General Motors elicited agreements from all the dealers that none of them would do business with the discounters. These agreements, which were interrelated and interdependent were worked out in meetings and telephone conversations in which it was acknowledged that substantial unanimity was essential for their success.

61. 93 U.S. 333 (1969).

62. *Id.* at 335. Compare the basis for the Court's finding of concerted acts in this case with the manner in which the Court of Justice established concerted practices in the *Dyestuffs* case. In *Container Corp.*, the evidence showed that detailed price information on *individual customers* was furnished with the *expectation of reciprocity*. In *Dyestuffs*, on the other hand, the evidence mentioned by the Court of Justice did not show any actual expectation of reciprocity when prices were announced. There was nothing to indicate that the intentions of the parties involved were to obligate themselves to follow any certain scheme of cooperation.

able standards for proving anticompetitive intent from circumstantial evidence, one caveat is in order. It is important to remember that these standards, while valid, are only reference points to guide the trier of facts in evaluating a given body of circumstantial evidence. They are foci around which to associate different bits of information. As such they are necessarily somewhat crude indicia of whether a concerted practice is actually present since in the evaluation of circumstantial evidence, a concerted practice can be found if it is only reasonable to conclude that enterprises have acted with the requisite intent. Within the broad range of what is reasonable, conscious parallelism and concerted practices can co-exist. Consequently, it must be recognized that even where there are well designed criteria for distinguishing concerted practices from conscious parallelism, such criteria can rarely, if ever, be perfectly effective.

CONCLUSION

Behind current efforts to determine the appropriate meaning of the term "concerted practice" in article 85(1) of the Treaty of Rome is a fundamental conflict over basic antitrust policy. It arises from the necessity of Community antitrust laws to somehow strike a balance between control over behavior having noncompetitive effects and the freedom of commercial enterprise necessary to insure the kind of continuous and stable economic development described in article 2 of the Treaty of Rome. The issue of whether this can best be accomplished by a rule-oriented approach or a result-oriented approach is raised by the failure of the Court of Justice in the *Dyestuffs* case to adequately distinguish concerted practices from conscious parallelism. There, the Court in effect held the enterprises involved strictly liable for the decline of price competition in dyestuffs in EEC markets. It has been shown that this is inconsistent with the purposes of the Treaty of Rome and the needs of the Common Market, and that more attention to the proof of anticompetitive intent is necessary. That workable evidentiary standards are available for this task is beyond question, although they are not infallible. The underlying premise of article 85 is that some imperfection is but a small price to pay for an antitrust policy based on the individual responsibility of enterprises acting in truly free competition.

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